Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

VISITING NURSE SERVICES OF
WESTERN MASSACHUSETTS, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and
SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 285, AFL-CIO,CLC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Given that "the Congressional scheme with the National Labor Relations Act is to effectuate a ". . . National labor policy", *NLRB v. Food Stores Employees Local 347*, 417 U.S. 1 (1974) should the National Labor Relations Board apply two (2) different standards in two (2) different circuits and two (2) different regions for the same issue? (unilateral change issue).

2. Given the unilateral implementation of a "*package*", is a National Labor Relations Board's reinstatement order that allows a union to keep what it wants from the package while requiring a rescinding of what it doesn't want a failure to reinstate the "*status quo*" and/or is it "punitive" rather than "*remedial*"?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, has no parent corporation and no publicly held company owns 10% or more of its stock.

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The Petitioner Visiting Nurse Services of Western Massachusetts, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINION BELOW

The Opinion of the United States Court of Appeals for the First Circuit is published as *Visiting Nurse Services of Western Massachusetts, Inc. v. National Labor Relations Board, and Local 285, Service Employees International Union, AFL-CIO,CLC.*, 177 F.3d 52 (1999).

STATEMENT OF JURISDICTION

The First Circuit entered judgment on May 24, 1999. This Writ of Certiorari is being filed in accordance with 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. Facts

Petitioner, Visiting Nurse Services of Western Massachusetts, Inc. (VNS) serves the Western Massachusetts area with both nursing and home health aide care. The nurses are represented by the Service Employees International Union, Local 285 ("the Union"). The collective bargaining agreement between the parties expired on October 31, 1992. The parties attempted to negotiate a successor agreement from July 1995 through March 1997 with all proposals by the employer *subject to an acceptable total "final package" agreement.*

On or about November 2, 1995, a VNS mini "package" proposal to the union provided for a two-percent wage increase and for a change from a weekly to a bi-weekly payroll system, that would become effective on November 6, 1995. The union rejected the package and the VNS withdrew same. On or about December 6, 1995, the VNS submitted another mini "package" proposal to the union, similar to the November 2, 1995 package, except with additional language allowing the employer to determine job classifications based on operational needs. Again, the union rejected the package and the employer withdrew same. On February 29, 1996, the VNS submitted another mini "package" proposal to the union, offering a two-percent increase retroactive to November 6, 1995, along with changing to a biweekly payroll system and having control over determining job classifications based on operational needs. The Union rejected the VNS proposal and voiced their bargaining unit's opposition to a bi-weekly payroll system as well as the proposed job classification rights. On March 21, 1996, based on operational and economic needs the VNS notified the Union, "in writing," of their intent to implement both the wage increase and the bi-weekly pay proposal as a package. On or about March 26, 1996, the union replied to the VNS notice stating "we oppose the unilateral implementation of the bi-weekly payroll system . . . You have decided to tie your proposed two percent increase in employee wages to the implementation of a bi-weekly payroll system and we rejected that combined proposal". The Union *did not request any negotiations* so the VNS implemented the wage increase on April 7, 1996 and the bi-weekly payroll system on May 3, 1996.

Subsequently, the parties returned to the bargaining process on June 18, 1996. At that time the VNS presented

another mini "package" proposal. This proposal retained the earlier proposed job classification changes and also included a "second" two percent wage increase that would become effective July 7, 1996. The June 18, 1996 proposal also as a package included: (a) changing three holidays into "*floating* holidays" that could be taken at the employee's request; (b) the implementation of a "clinical ladder" program that would allow staff to earn additional income given additional training; and (c) the adoption of an enterostomal therapist classification and program. The VNS submitted this as a "mini package" which included; a two percent wage increase along with the above referenced proposals on floating holidays, the clinical ladders, and enterostomal therapist and classification program. The union rejected the package.

In a letter dated "*August 20, 1996*" the VNS notified the union "in writing" that as of "*September 6, 1996*," it was contemplating implementing the "mini package" while the parties "*continued to bargain*" for a complete successor agreement. Late, September 5, 1996, some 16 days later and one day prior to the scheduled implementation, the union responded to the VNS's August 20, 1996 letter and opposed the unilateral implementation of these proposals. The union requested that the VNS not make any changes to wages, hours or working conditions. On or about September 13, 1996, the VNS sent a memorandum to bargaining unit employees, "*including union stewards*," telling them that it had implemented the June 18, 1996 "mini package" with the wage increase to be applied retroactively to July 7, 1996 and that the union disagreed. Bargaining for a successor contract continued on.

B. Proceedings Below

1. National Labor Relations Board

The Union filed an original charge with the NLRB on September 30, 1996 and later amended that charge on November 12, 1996, alleging a unilateral change relative to the items that had already been implemented on September 6, 1996. The employer argued that the incorporation of the April 7 and May 7, 1996 changes was beyond the six month jurisdictional time limit provided by Section 10(b) of the act. The Board however, determined that the charges were "closely related" and ruled on all of the charges including the changes that were made over six months before the November amendment incorporating these changes as part of the charge. Based on all of these charges the General Counsel for the NLRB issued a complaint against the VNS on December 31, 1996, and amended that complaint on April 24, 1997.

On July 20, 1998, the NLRB found against the employer and ordered the employer to:

> . . . if requested to do so by the union, to rescind the unlawful unilateral changes, to reinstate the terms and conditions of employment *in those areas* that existed before the respondent's unlawful unilateral changes, and to make the unit employees whole for any losses attributable to its unlawful conduct. . . . To the extent that the unlawful unilateral changes implemented by the respondent may have improved the terms and conditions of employment of unit employees, the Order set forth below shall not be construed as

> requiring the Respondent to rescind such improvements unless requested to do so by the union.

Visiting Nurse Services of Western Mass. v. NLRB & SEIU, 177 F.3d 52 (1999). The order conspicuously omitted any reference to the Board findings of "package" bargaining.

2. United States Court of Appeals (First Circuit)

On January 5, 1999, the VNS appealed to the United States Court of Appeals for the First Circuit seeking a review of the Board order citing the Board's reasoned decision in the Fifth Circuit, the Fifth Circuit's authority and argued that the order did not restore the status quo and was punitive. The Court of Appeals held that an employer who has not reached a general impasse on "the whole" of the collective-bargaining issues involved cannot take unilateral action on particular issues even after providing a written notice that those specific issues would be implemented. The court held that

> employees may keep the *quid* of wage increases while the employer may not keep the *quo* of the rest of the package is *the consequence* of the employer's decision to unilaterally remove these subjects from the bargaining and implement them without union agreement. There is nothing punitive about the Board's decision not to act on the wage increase in the absence of an unfair labor practice charge.

The employer had argued that in accordance with the principles accepted by the Board in the Fifth Circuit,

Pinkston-Holar Construction Services, 312 NLRB No. 148, (NLRB 1993) *on remand from NLRB v. Pinkston-Holar Construction Services*, 954 F.2d 306 (5th Cir. 1992) that after providing a written notice of a contemplated implementation, and after not being contacted by the union until the last minute, that it could implement the "package" proposal involved. The employer had also argued that a Board order allowing the union to "pick" what proposals out of the "package" had to be rescinded and what "proposals" it could keep was *not* a return to "*status quo*" and was in fact "*punitive*" rather than "*remedial*."

REASONS FOR GRANTING THE WRIT

The decision below warrants this Court's review because the Courts of Appeal are in conflict between the First and Fifth Circuit in applying the standard of review for determining an employer's right to implement during the course of negotiations. In applying the Supreme Court *Katz* decision, [*NLRB v Katz*, 369 U.S. 736 (1962)] the First Circuit, unlike the Fifth, does not consider Footnote 12 of the case in determining what, whether, and when an employer can unilaterally institute changes. *See NLRB v. Katz*, 369 U.S. 736 (1962). The National Labor Relations Board itself is in conflict by its Regions. This is "not" how a "national" policy is created and maintained.

The questions presented by this petition, in our opinion, pose important considerations concerning judicial certainty, administrative justice, and the proper application of the National Labor Policy. The division between the First and Fifth Circuits and the Board's First and Fifth Regions cannot be resolved without direction by this Court. The NLRB has accepted the rationale of the Fifth Circuit and a different rationale in the First Circuit given the same issue. In addition, the First Circuit rejects the Fifth Circuit's rationale without

any explanation as to why employers in the Fifth Circuit can have a different National Labor Relations Board standard than the First Circuit given the same issue. The Board, for its part, provided a "*reasoned*" explanation for *accepting* the Fifth Circuit principles but, then, simply states that it "*declines*" to accept that reasoning and rationale in the First Circuit.

I.

BOTH THE NATIONAL LABOR RELATIONS BOARD BY REGION AND THE COURTS OF APPEAL BY CIRCUIT ARE IN CONFLICT.

As noted above, the National Labor Relations Board and First and Fifth Circuits have by their actions created two separate standards of review in determining when and what can be implemented by an employer in collective bargaining. In *Pinkston-Holar Construction Services v. NLRB,* 312 NLRB No 148 2686, the full board has ruled on remand;

> . . . an employer may make changes without the approval of the union as the bargaining agent. The union has no absolute veto power under the Act. Nor do negotiations necessarily have to exhaust themselves to the point of the so-called impasse. But there must be discussion prior to the time the change is initiated. An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals. . . . Thus, *we apply the court's "notice and opportunity" standard only to this case. Our decision is not to be construed as an adoption of the court's legal standard as Board precedent.*

Footnote 5 *Pinkston-Holar Constr. Services,* 312 NLRB No. 148, (NLRB 1993).

The First Circuit has held:

> [A]s a general rule, when, as here, parties engage in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide a union with notice and an opportunity to bargain about a particular subject matter before implementing such changes. Rather, an employer's obligation under such circumstances encompasses a duty to refrain from implementing such changes at all, absent *overall impasse* on bargaining for the *agreement as a whole*. There are two limited exceptions to that general rule: (1) When the union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, or (2) when economic exigencies or business emergencies compel prompt action.

Visiting Nurse Services, 177 F.3d 52 (1999).

The conflicting application by the Board and by these Circuits is a result of a reading of the Supreme Court Decision in *NLRB v. Katz,* 369 U.S. 736 (1962). This conflict is apparent in the First Circuit's *Visiting Nurse Services* decision, as the First Circuit does not address the reasoned decisions of the Board or the Fifth Circuit when it simply decides to ignore the *Pinkston-Holar* case as "*inconsistent* with the approach taken by this Circuit" *See Visiting Nurse Services,* 177 F.3d 52 (1999).

In both *Katz* and *Pinkston-Holar Constr. Services*, the Courts applied a "notice and consultation standard", with no mention of a duty to refrain from implementing changes, absent an "*overall impasse*" on bargaining for the agreement "*as a whole*." Yet the First Circuit held the VNS to this standard, without any reasonable explanation other than "that's the way we do it here in the First Circuit."

II.

THE QUESTIONS PRESENTED ARE IMPORTANT TO THE ADMINISTRATION OF JUSTICE FOR ALL EMPLOYERS IN ALL CIRCUITS AND THE RIGHTS OF THE PARTIES AND NEGOTIATORS TO HAVE A UNIFORM APPLICATION OF A NATIONAL LABOR POLICY.

This Court has granted certiorari when conflict exists between the circuits and controversy arises in the application of a standard of review that is expected to be uniformly applied.

> Congress has conferred upon the National Labor Relations Board the authority and, more importantly, the "*responsibility*" to develop and apply a fundamental national labor policy, for determining unfair labor practices. Given this mission the Board, in our opinion, must apply its principles on a "*universal basis*" for all regions, circuits and practitioners. The Act neither compels an agreement between employees and employers nor does the Act regulate the substantive terms governing wages, hours, and working conditions which are incorporated in an agreement.

NLRB v. American Nat. Ins. Co., 343 U.S. 395, 401-02 [30 LRRM 2147] (1952). The order in this case directly regulated what a union could take and reject in a "package" bargaining process involving *Two(2)* different "*Package Proposals*" that were implemented on different dates.

"The theory of the Act is that the making of *voluntary* labor agreements is encouraged by protecting employees' rights to organize for collective bargaining and, by imposing on labor and management the mutual obligation to bargain collectively." *NLRB v. American Nat. Ins. Co.*, [343 US 395] 343 U.S. 395, 402 (1952). ". . . Moreover, the Act does not encourage a party to engage in fruitless marathon discussions and the Board *may not, either directly or indirectly, compel concessions* or otherwise sit in judgment upon the substantive terms of collective bargaining agreements." *NLRB v. American Nat. Ins. Co.*, 343 U.S. 395, 401-02 [30 LRRM 2147] (1952). The Board in the case at hand did compel two concessions worth 4% to the employer when the Board fashioned an order that would let a union "pick" what it wanted from *Two (2)* separate and distinct "*package*" proposals that were implemented on *Two (2) different dates* that are more than six (6) months apart, as opposed to requiring a return to a ***full status quo***.

Both the First and Fifth Circuits are in conflict as to the standard to be applied when determining if and when the parties can implement a proposal or proposals. In addition, the First Circuit ignored both Board law and Fifth Circuit law without an explanation other than "that's the way we've done it," then, it upheld a Board order that allowed a union to pick what it wanted out of *Two (2)* different package proposals package proposal as a means to return to the "status quo ante." To our knowledge there is *no precedent* or case law to support this type of a punitive as opposed to "*remedial*" remedy.

Accordingly, in the interest of accomplishing uniformity within the circuits and uniformity in the application of a "National" Labor Policy, the Petitioner respectfully asks that this petition for a writ of certiorari be granted.

CONCLUSION

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MAY 24, 1999

United States Court of Appeals
For the First Circuit

No. 98-1993

VISITING NURSE SERVICES
OF WESTERN MASSACHUSETTS, INC.,

Petitioner, Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent, Cross-Petitioner,

and

LOCAL 285, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO, CLC,

Intervenor.

PETITION FOR REVIEW OF A DECISION AND
ORDER BY THE NATIONAL LABOR
RELATIONS BOARD

Before
Torruella, *Chief Judge*,
Stahl, Lynch, *Circuit Judges*.

May 24, 1999

* * *

Appendix A

LYNCH, *Circuit Judge*. This petition by the Visiting Nurse Services of Western Massachusetts, Inc. ("VNS") seeks review of an order by the National Labor Relations Board dated July 20, 1998. The NLRB has filed a cross-petition for enforcement of its order. Local 285 of the Service Employees International Union ("the Union"), was permitted to intervene on the side of the Board. Of most significance here is VNS's attempt to read the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. § 158 (1994), as permitting an employer who has not reached general impasse on the package of collective-bargaining issues to nonetheless take unilateral action on particular issues after declaring there was impasse on those specific issues. The Board has rejected that argument, as do we.

I

VNS is a corporation based in Holyoke, Massachusetts, which provides home-based nursing home services. The last collective bargaining agreement between VNS and the Union expired on October 31, 1992; between July 1995 and March 1997, the parties attempted to negotiate a successor agreement.[1] We recite the facts as taken from the stipulated

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1. The following employees constituted a bargaining unit for collective-bargaining purposes within the meaning of § 9(b) of the Act:

> All full-time and regular part-time professional employees, including nurses, public health nurses, physical therapists, and social workers, employed by [VNS] at its Holyoke, Massachusetts[,] location, but

(Cont'd)

facts before the Board. *See Visiting Nurse Servs. of W. Mass., Inc.*, 324 N.L.R.B. No. 212, 59 L.R.R.M. (BNA) 1298, 1998 WL 414982, at *15 n.2 (July 20, 1998) (hereinafter "*Visiting Nurse Servs.*").

The parties met to negotiate on November 2, 1995. VNS then presented a written proposal which stated, in pertinent part, that:

> All proposals are and will be set forth based on a package bargaining basis. This means that if any portion of the package is unacceptable then the whole package is subject to revision. In this respect . . . if there are tentative agreements in a package but the whole package is not accepted then the tentative agreements are also subject to revision, deletion, addition, change etc. . . . *[A]ll agreements will be subject to an acceptable total "final package" agreement.* . . .

(Emphasis in original.) VNS's package proposal provided for a two-percent wage increase and for a change from a weekly to a bi-weekly payroll system, to become effective on November 6, 1995. The Union did not accept the proposal but expressed a willingness to bargain about various

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(Cont'd)

> excluding office clerical employees, home health aides, managerial personnel, and guards and supervisors as defined in the Act.

Visiting Nurse Servs. of W. Mass., Inc., 324 N.L.R.B. No. 212, 159 L.R.R.M. (BNA) 1298, 1998 WL 414982, at *2 (July 20, 1998).

proposed alterations to the job classifications for employee nurses. VNS presented a "substantially identical" proposal on December 6, 1995, but this proposal also granted VNS "the sole and unqualified right to designate [job] classifications as it deemed necessary based on operational needs." *Visiting Nurse Servs.*, 1998 WL 414982, at *4.

On February 29, 1996, VNS again offered the Union a two-percent wage increase, effective retroactively to November 6, 1995, in return for the Union's agreement to its proposals for a bi-weekly payroll system and the job classification changes. The Union, acknowledging the broad opposition (within its membership) to the bi-weekly payroll system, rejected the proposal. *See id.* Nevertheless, on March 21, 1996, VNS notified the Union that "based on operational and economic realities [VNS] intend[ed] to implement 'both' the wage increase and the bi-weekly pay proposals that, to date, [VNS and the Union had] been unable to agree on." Five days later, the Union replied: "We oppose the unilateral implementation of the bi-weekly payroll system. . . . You have decided to tie your proposed two percent increase in employee wages to the implementation of a bi-weekly payroll system and we have rejected that combined proposal." VNS implemented the wage increase on April 7, 1996, and the bi-weekly payroll system on May 3, 1996.

On June 18, 1996, VNS presented another "package proposal." This proposal retained the earlier proposed job classification changes and included a second two-percent wage increase (to become effective July 7, 1996). The proposal also added three new provisions: 1) the transformation of three holidays into "floating" holidays to

be taken at a time requested by the employee; 2) the implementation of a "clinical ladders" program;[2] and 3) the adoption of an enterostomal therapist classification and program.[3] On the same day, VNS also proposed a smaller, alternative package (the "mini package") which also included a second two-percent wage increase along with the above proposals on floating holidays and the clinical ladders and enterostomal therapist and classification programs.

The parties did not reach agreement on either proposal. In a letter dated August 20, 1996, VNS advised the Union that as of September 6, 1996, it was contemplating implementing the "mini package" and that "all of the above items [were] the 'positives' that [the parties] discussed that could be implemented while bargaining for a successor agreement continued." The Union responded on September 5, 1996: "We oppose the unilateral implementation of these proposals. The Union request[s] that you *not* make any changes to wages, hours or working conditions. Please do not hesitate to call me to arrange a meeting as soon as possible to discuss this and other outstanding issues." (Emphasis in original.)

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2. A company handout described "clinical ladders" as "practices and achievements that are above and beyond one's standard job performance." *Visiting Nurse Servs.*, 1998 WL 414982, at *6. It further explained that "[a] monetary incentive accompanies each Step Level. . . . Each individual that meets the criteria for a Step on the clinical ladder will receive a monetary reward, professional recognition, and certificate of achievement." *Id.*

3. An enterostomy is "the formation of a permanent opening into the intestine through the abdominal wall." R. Sloane, *The Sloane-Dorland Annotated Medical-Legal Dictionary* 255 (1987).

VNS then sent a memorandum, dated September 13, 1996, to the bargaining unit employees (but not to the Union) informing them that it had implemented the mini package with the wage increase to be applied retroactively to July 7, 1996. Ten days later, VNS advised the Union that the wage increase had already been implemented and that the other programs (floating holidays, clinical ladders, and enterostomal therapist and classification) were "already in process." After emphasizing its view that these were "only 'positive items' " meant to enhance the staff's economic conditions while bargaining continued, VNS declared that "it [was] the Agency's position that the mini package involved ha[d] been properly implemented."

The Union filed a charge with the NLRB on September 30, 1996; it amended that charge on November 12, 1996. Based on these charges, the General Counsel of the NLRB issued a complaint against VNS on December 31, 1996, and amended that complaint on April 24, 1997.

II

The NLRB order found that VNS violated §§ 8(a)(1) and (5) of the Act by unilaterally implementing 1) a bi-weekly payroll system on or about May 3, 1996; 2) changes in holidays on or about September 6, 1996; 3) a clinical ladder program on or about September 6, 1996; 4) an enterostomal therapist classification and program on or about September 6, 1996; and 5) changes in job classifications at some time subsequent to May 3, 1996. VNS made these changes while it was still bargaining with the Union and had not yet reached general impasse. *See Visiting Nurse Servs.*, 1998 WL 414982, at *11. There is no dispute that all of these are mandatory subjects of bargaining under § 8(d) of the Act.

Before the NLRB, the parties stipulated that they had not reached impasse in their bargaining on the agreement as a whole. Thus, under controlling law, because impasse had not been reached, the employer could take unilateral action on a mandatory subject of bargaining only under a narrow range of circumstances. *See N.L.R.B.* v. *Katz*, 369 U.S. 736, 741-43 (1962). No economic exigencies or business emergencies existed here which would warrant unilateral action. *See Visiting Nurse Servs.*, 1998 WL 414982, at *9; *see also N.L.R.B.* v. *Triple A Fire Protection, Inc.*, 136 F.3d 727, 739 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 795 (1999) (noting that "[a] situation of economic necessity requires either a showing of extenuating circumstances or a compelling business justification" (internal quotation marks omitted)). The NLRB found that the usual rule applied and there were no exceptions. *See Visiting Nurse Servs.*, 1998 WL 414982, at *9-10. The NLRB issued a broad remedial order based on a finding that VNS has a proclivity to violate the Act.[4] *See id.* at *13-14. One member dissented, finding the stipulated record insufficient, and would have remanded

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4. In a decision issued two years before VNS's unilateral actions in the case at hand, the Board found that VNS had a proclivity to violate the Act and, therefore, merited a broad remedial order. "[VNS] is a repeat offender along a broad spectrum of Section 8(a)(1) conduct. . . . [VNS] has already had a bite of the apple. To fail to invoke a broad injunctive order is to invite further statutory misconduct." *Holyoke Visiting Nurses Ass'n*, 313 N.L.R.B. No. 182, 146 L.R.R.M. (BNA) 1047, 1994 WL 127305, at *27 n.9 (Apr. 11, 1994) (citing this court's findings in *Holyoke Visiting Nurses Ass'n* v. *N.L.R.B.*, 11 F.3d 302 (1st Cir. 1993)). VNS has changed its corporate name, and the parties have stipulated that VNS is identical to Holyoke Visiting Nurses Association. *See Visiting Nurse Servs.*, 1998 WL 414982, at *15 n.1.

the matter to an administrative law judge for a full hearing. *See id.* at *16.

III

We review the Board's conclusions of law de novo, *see N.L.R.B.* v. *Beverly Enterprises-Massachusetts, Inc.*, 1999 WL 179667, at *3 (1st Cir. Apr. 6, 1999) (citing the Administrative Procedure Act, 5 U.S.C. § 706), and take the Board's findings of fact to be "conclusive if supported by substantial evidence on the record considered as a whole." *Id.* (citing 29 U.S.C. § 160(e)).

VNS makes four arguments. First, it argues that the rule adopted by the Fifth Circuit in *N.L.R.B.* v. *Pinkston-Hollar Construction Services, Inc.*, 954 F.2d 306 (5th Cir. 1992), should be adopted here and that this rule would excuse VNS's unilateral actions.

Second, VNS says the NLRB's determination that VNS in fact implemented the clinical ladders program and enterostomal therapist classification and program is not supported by substantial evidence. Accordingly, the issue was not ripe and should not have been the subject of an order.

Third, VNS says it was error for the Board to accept as an amendment to the complaint any claims about the earlier implementation of the bi-weekly payroll. VNS says this is barred by the applicable limitations period in § 10(b) of the Act. The original unfair labor practice charge was filed by the Union on September 30, 1996, and included all the items at issue in this case save for the May 1996 installation of a

bi-weekly payroll system. That charge was timely as to the claims alleged. The General Counsel issued a complaint pursuant to it. On November 12, 1996, that complaint was amended to include the bi-weekly payroll system implemented as of May 3, 1996. The NLRB's finding that the amended complaint claims were "closely related" to those in the original complaint is attacked.

Fourth, VNS argues that the Board's order is unenforceable because it required the employer to return only to a partial status quo ante, not the complete status quo ante. Under the Board's remedial order, the Union members' two two-percent wage increases are untouched, but the employer is required to rescind (at the Union's request) the other parts of its bargaining package which it wants and which it unilaterally implemented. VNS says this one-sidedness is particularly unfair since it needed the other items in the bargaining package in order to fund the pay raises. Such an order is punitive, says VNS, and the NLRB can only make remedial orders.

A. *Obligation To Bargain When No General Impasse Exists*

Relying on the Fifth Circuit's decision in *Pinkston-Hollar*, VNS argues that once it had given the Union notice of its position on a particular issue and an opportunity to respond, it was free to unilaterally declare impasse on specific issues and to take action.

In response to the employer's contention, the Board held:

> [A]s a general rule, when, as here, parties are engaged in negotiations for a collective-

> bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide a union with notice and an opportunity to bargain about a particular subject matter before implementing such changes. Rather, an employer's obligation under such circumstances encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole. There are two limited exceptions to that general rule: (1) when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, or (2) when economic exigencies or business emergencies compel prompt action.

Visiting Nurse Servs., 1998 WL 414982, at *9 (internal footnotes omitted). The Board found that neither exception applied.

Both the Supreme Court and this court have affirmed the rule that unless the employer has bargained to impasse on the agreement as a whole, there is a violation of §§ 8(a)(1) and (5) if the employer makes unilateral changes in mandatory subjects of bargaining (subject to the very limited exceptions described above). *See Litton Fin. Printing Div.* v. *N.L.R.B.*, 501 U.S. 190, 198 (1991) (citing *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962)); *Rivera-Vega* v. *ConAgra, Inc.*, 70 F.3d 153, 162 (1st Cir. 1995) (citing *Katz*, 369 U.S. at 743). The doctrine applies where an existing contract has expired and the negotiations for a new one are not concluded. *See Litton*, 501 U.S. at 198.

This court has long said that an employer must bargain to impasse before making a unilateral change. *See N.L.R.B.* v. *U. S. Sonics Corp.*, 312 F.2d 610, 615 (1st Cir. 1963). The basic principles were established in 1962 by the Supreme Court's decision in *N.L.R.B.* v. *Katz*, 369 U.S. 736 (1962). Analogizing to the unlawful situation of a refusal to negotiate as to "any subject" within § 8(d) of the Act as to which the union seeks to negotiate, the Court held that:

> an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.

Id. at 743. *Katz* also rejected the argument that subjective bad faith is required to find a § 8(a)(5) violation. *See id.* at 747. *Katz* involved a newly certified union and the failure to reach an initial agreement. *See id.* at 739-40.

The Supreme Court has applied the *Katz* rule to situations, as here, where an existing agreement has expired but negotiations on a new one had not been completed. *See Laborers Health and Welfare Trust Fund for N. Cal.* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 544 n.6 (1988). Further, in *Litton* the Court reaffirmed that "an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton*, 501 U.S. at 198; *see also Beverly Enterprises*, 1999 WL 179667, at *7, *11 (describing the *Katz* rule); *Rivera-Vega*, 70 F.3d at 162 (applying the *Katz* rule).

We reject VNS's position that parties are at impasse merely because the Union rejects or does not accept the employer's position on a particular issue. "[M]ere rejection of a bargaining proposal does not create an impasse." *N.L.R.B.* v. *Central Plumbing Co.*, 492 F.2d 1252, 1254 (6th Cir. 1974). Whether there is an impasse is an intensely fact-driven question, with the initial determination to be made by the Board. Our role is to review the Board's factual determinations to determine whether there is substantial evidence in the record as a whole to support the Board's finding on impasse. There may be instances where one or two issues so dominate and drive the collective bargaining negotiations that the Board would be justified in finding that impasse on those one or two issues amounts to a bargaining deadlock. *Cf. American Federation of Television and Radio Artists, Kansas City Local* v. *N.L.R.B.*, 395 F.2d 622, 628 n.13 (D.C. Cir. 1968) (noting that "a deadlock on one critical issue can create as impassable a situation as an inability to agree on several or all issues"). But that is a far cry from this case. As this court has said, "[i]mpasse occurs when, after good faith bargaining, the parties are deadlocked so that any further bargaining would be futile." *Bolton-Emerson, Inc.* v. *N.L.R.B.*, 899 F.2d 104, 108 (1st Cir. 1990).

The Supreme Court has commented on the difficulty of applying the concept of "impasse" to a given set of facts, noting: "perhaps all that can be said with confidence is that an impasse is a state of facts in which the parties, despite the best of faith, are simply deadlocked." *Laborers Health*, 484 U.S. at 543 n.5 (quoting R. Gorman, *Basic Text on Labor Law, Unionization and Collective Bargaining* 448 (1976)) (internal quotation marks omitted).

The NLRB has similarly interpreted the scope of the statutory duty to bargain. Congress delegated to the Board, in § 8(d) of the Act, the responsibility to make that interpretation. *See Ford Motor Co.* v. *N.L.R.B.*, 441 U.S. 488, 496 (1979). The Board's interpretation is rational and consistent with the Act. *See Litton*, 501 U.S. at 200 ("[I]f the Board adopts a rule that is rational and consistent with the Act . . . then the rule is entitled to deference from the courts." (quoting *Fall River Dyeing & Finishing Corp.* v. *N.L.R.B.*, 482 U.S. 27, 42 (1987) (internal quotation marks omitted)).

Collective bargaining involves give and take on a number of issues. The effect of VNS's position would be to permit the employer to remove, one by one, issues from the table and impair the ability to reach an overall agreement through compromise on particular items. In addition, it would undercut the role of the Union as the collective bargaining representative, effectively communicating that the Union lacked the power to keep issues at the table.

In rejecting another employer's argument that it could unilaterally change a term or condition of employment as soon as the union was notified of the intended change and given an opportunity to bargain, the NLRB stated:

> By utilizing this approach with respect to various employment conditions seriatim, an employer eventually would be able to implement any and all changes it desired regardless of the state of negotiations between the bargaining representative of its employees and itself. . . . [U]nder this approach, form, rather than substance, becomes

> the determinative factor in deciding whether the bargaining obligation has been fulfilled. In consequence, meaningful collective bargaining is precluded and the role of the bargaining representative is effectively vitiated.

Winn-Dixie Stores, Inc., 243 N.L.R.B. No. 151, 101 L.R.R.M. (BNA) 1534, 1979 WL 9346, at *4 (Aug. 2, 1979). The Board's approach is both rational and consistent with the NLRA and so is entitled to deference. *See Litton*, 501 U.S. at 199.

The *Pinkston-Hollar* case does not assist VNS. First, it is inconsistent with the approach taken by this Circuit. *See Rivera-Vega*, 70 F.3d at 162; *N.L.R.B.* v. *U.S. Sonics Corp.*, 312 F.2d 610, 615 (1st Cir. 1963). Second, the case is best understood as one where the court found that the union failed to bargain and to act with due diligence after being given the employer's proposal. *See N.L.R.B.* v. *Triple A Fire Protection*, 136 F.3d 727, 738-39 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 795 (1999). But VNS does not argue here that the Union avoided or delayed bargaining and so *Pinkston-Hollar* is, even on its own terms, inapplicable.

B. *Ripeness*

VNS argues that it never actually finalized or implemented the clinical ladder program or the creation of an enterostomal therapist classification and program, and so these matters were not ripe for Board action. VNS says that the Board's contrary determination was not supported by substantial evidence. This court has explained that "[s]ubstantial

evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. The reviewing court must consider the record in its entirety. . . ." *Beverly Enterprises*, 1999 WL 179667, at *3 (internal quotation marks and citations omitted).

To find that VNS had in fact implemented these programs, the Board relies on a September 13, 1996, memorandum from VNS. That memorandum, as VNS argues, only establishes that the wage increase was being adopted. But on September 23, 1996, VNS sent out a letter (on which the Board also relies) saying that the remaining changes were "already in process." The Board also found that a registered nurse (who was a unit employee) was selected for the enterostomal therapy program and actually trained.[5] The Board also says that the job classification program was implemented before June 13, 1997.

VNS argues that because the September 23 letter explicitly concedes that the wage increase had already been adopted (or "rolled in"), the language describing the remaining changes as being merely "in process" must mean that those changes had not yet been "finalized." The phrase "in process" (or "into process") appears twice in the September 23 letter:

> As we [VNS] had pointed out in our notice to the Union, implementation was contemplated for 9/6/96. The items involved are items that had to

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5. VNS paid for all of her training and also paid her full regular wages during the entire period of training. In return, the nurse committed to at least 3 years of continued employment with VNS. *See Visiting Nurse Servs.*, 1998 WL 414982, at *7.

> be put *into process* for implementation on the 6th. Accordingly, by the time you contacted us we had already prepared the payroll with the increase rolled in. In addition, the other programs are also items that we had to prepare for in advance and they too are already *in process*.

(Emphasis added.) VNS's interpretation of this language sees a material difference between the implementation of the wage increase (which VNS concedes) and the implementation of the other changes (which VNS disputes). We reject such a strained reading.

To begin, VNS's interpretation misses the relevant legal question: the issue here is whether, in the absence of a general impasse, VNS unilaterally adopted or implemented the programs still under negotiation, *not* whether VNS had already fully *executed* the programs. *Cf. Winn-Dixie, Inc.*, 1979 WL 9346, at *4 (stating that an employer may not unilaterally "implement" changes absent an impasse). A sentence from the last paragraph of the letter speaks directly to this question by stating "the Agency's [VNS's] position that *the mini package* involved *ha[d] been properly implemented*" (emphasis added). This indicates that VNS had already made the decision — had already taken unilateral action — to implement the proposed programs that were still under negotiation.

That these changes were merely "in process" on September 23, 1996, does not alter our conclusion. Contrary to VNS's interpretation, the letter indicates that the entire mini package had already been adopted and the only remaining question

was when the other programs would actually "roll in." The facts surrounding the implementation of the enterostomal therapist program bolster our view. On October 7, 1996, merely two weeks after sending the September 23 letter, VNS paid for a unit employee nurse to begin her training in the enterostomal therapist program, one of the other programs included in the mini package.

It is, in fact, unlikely that any program could be "in process" without VNS first *adopting* the new program and setting in motion the gears that would eventually effectuate that program. The Board concluded that that is what happened in this case, and we see ample and substantial evidence to support its finding. *Accord Beverly Enterprises*, 1999 WL 179667, at *3 (noting that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence" (internal quotation marks omitted)).

C. *Timeliness*

The amendment to the complaint to cover the May 1996 implementation of a bi-weekly payroll system is not time-barred. Section 10(b) of the Act provides both that a *charge* must be filed within six (6) months of the unfair labor practice in order for a *complaint* to issue and that the Board may, in its discretion, provide for amendment of the complaint at any time before the order issues. *See* 29 U.S.C. § 160(b). Indeed, this six-month rule does not apply to the issuance of an amendment to a complaint, but only to the filing of a charge. *See Truck Drivers & Helpers Union, Local No. 170* v. *N.L.R.B.*, 993 F.2d 990, 1000 n.12 (1st Cir. 1993). There is no dispute that the initial charges were timely.

The NLRB permits amendment when the new charges are closely related to the original timely charges. Courts liberally interpret the NLRB's power to amend a complaint. *See Eastern Maine Medical Center* v. *N.L.R.B.*, 658 F.2d 1, 6 (1st Cir. 1981) (noting that § 10(b)'s grant of discretion to amend a complaint "has been interpreted liberally to allow the relation back of amendments alleging acts that are part of the same general course of conduct as the acts alleged in the charge and within the same time frame" (footnote omitted)). "A complaint based on a timely filed charge may be amended to include other allegations if they are 'closely related' to the underlying timely charge and occurred within six months of the charge." *Truck Drivers*, 993 F.2d at 1000 n.12. The test for determining whether alleged unfair labor practices are "closely related" is this:

> First, the Board will look at whether otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge. Second, the Board will look at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge. Finally, the Board will look at whether a respondent would raise similar defenses to both allegations.

Id. at 1000.

The Board was correct to find that the unilateral change in the payroll system was closely related to the timely charges about the unilateral changes in wages and hours. First, the bi-weekly payroll system allegations are based on the same

legal theory as the remaining allegations — namely, that VNS sought to circumvent the collective-bargaining process by making unilateral changes. *See N.L.R.B.* v. *Fant Milling Co.*, 360 U.S. 301, 307 (1959) (noting that allegations that involve "the same class of violations as those set up in the charge" may be included in the complaint). In fact, the allegations are based on the same section of the Act, § 8(a)(5), a fact that reflects closer legal proximity than the law requires. *See Truck Drivers*, 993 F.2d at 1001 ("With respect to the similarity between the legal theories underlying each charge, it is clear that the allegations need not be under the same statutory section. It is sufficient that both charges are part of the same effort or crusade against the union." (internal citations omitted)).

Second, the payroll system allegations arose from the same factual circumstances and sequence of events: the proposed payroll system was introduced within the same series of package proposals that included the other unilateral changes, and all of these changes occurred during the same period (from May to September 1996) during which the parties were negotiating. *See Truck Drivers*, 993 F.2d at 1001 ("Charges will be found closely related factually if they arise from the same sequence of events." (internal quotation marks omitted)).

Finally, the Board properly found that VNS would raise similar defenses to both sets of charges — charges based on the same statutory provision and fueled by the same legal theory. *See N.L.R.B.* v. *Overnite Transp. Co.*, 938 F.2d 815, 820 (7th Cir. 1991) (noting that a court should examine "whether a reasonable respondent would have preserved

similar evidence and prepared a similar case in defending against the allegations in the timely pending charge").

D. *Remedy*

VNS complains that the Board's rescission order in this case is beyond the Board's jurisdiction, is punitive, and improperly compels VNS to make concessions. To support this argument, VNS explains that the Board's order that VNS rescind the unlawful changes (at the Union's request) and return to the "status quo" would leave the two two-percent wage increases in place, thereby punishing VNS and forcing it to make concessions.

The Board has "the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act," and that discretion is "subject only to limited judicial review." *Sure-Tan, Inc.* v. *N.L.R.B.*, 467 U.S. 883, 888-89 (1984); *see also Pegasus Broadcasting of San Juan, Inc.* v. *N.L.R.B.*, 82 F.3d 511, 513 (1st Cir. 1996). "A Board-ordered remedy 'should stand unless it can be shown that [it] is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' " *Pegasus*, 82 F.3d at 513 (quoting *Virginia Elec. & Power Co.* v. *N.L.R.B.*, 319 U.S. 533, 540 (1943)).

The Board justifies its order by saying there was never an unfair labor practice charge filed about the wage increases and so there is no occasion to take action on them. It is no surprise that the Union did not complain about the wage increases. While unilateral wage increases given by the employer in the face of a union organizing or recognition

campaign have been the subject of unfair labor practice charges, *see, e.g.*, *N.L.R.B.* v. *Wis-Pak Foods, Inc.*, 125 F.3d 518, 525-26 (7th Cir. 1997) (upholding the NLRB's determination that the post-election grant of a wage increase was motivated by a desire to erode union support and was therefore an unfair labor practice), that is not the context here.

The employer here played a risky hand in its tactics, a hand contrary to the prevailing law. In the quid pro quo of collective bargaining, that employees may keep the quid of wage increases while the employer may not keep the quo of the rest of the package is the consequence of the employer's decision to unilaterally remove these subjects from bargaining and implement them without union agreement. There is nothing punitive about the Board's decision not to act on the wage increases in the absence of an unfair labor practice charge.

For the foregoing reasons we dismiss VNS's petition and we grant the cross-petition of the NLRB to enforce the Board's order.

APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED JULY 20, 1998

Visiting Nurse Services of Western Massachusetts, Inc. *and* Service Employees International Union, Local 285, AFL-CIO, CLC. Case 1-CA-34580

July 20, 1998

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS LIEBMAN AND BRAME

On a charge and an amended charge filed September 30 and November 12, 1996, respectively, by Service Employees International Union, Local 285, AFL-CIO, CLC (the Union) the General Counsel of the National Labor Relations Board issued a complaint and an amendment to the complaint on December 31, 1996, and April 24, 1997, respectively, against Visiting Nurse Services of Western Massachusetts, Inc. (the Respondent).[1] The complaint, as amended, alleges that the Respondent violated Section 8(a)(5) and (1) the Act by failing and refusing to bargain collectively with the Union as the exclusive collective-bargaining representative of the employees in the bargaining unit by unilaterally implementing changes in terms and conditions of

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1. The Respondent changed its corporate name from Holyoke Visiting Nurses Association, Inc. (Holyoke) to its present name in about May 1996. The parties have stipulated that the Respondent is identical to Holyoke and that its name change is not otherwise relevant to this proceeding.

employment of the employees in the bargaining unit, without affording the Union an opportunity to bargain with the Respondent about the above conduct and the effects of that conduct. The Respondent filed a timely answer to the complaint, admitting in part and denying in part the allegations, and asserting that certain allegations were time barred under Section 10(b) of the Act, and that the Union waived its right to further bargaining about certain of these subjects when notified of the Respondent's contemplated implementation of them.

On June 13, 1997, the Respondent, the Union, and the General Counsel filed with the Board a stipulation of facts and motion to transfer this proceeding to the Board. The parties agreed that the charge and amended charge, the complaint and amended complaint, the answer to the complaint, and the stipulation of facts, together with the exhibits attached to the stipulation of facts, constitute the entire record in this case, and that no oral testimony is necessary or desired. The parties waived a hearing before an administrative law judge, the makings of findings of fact and conclusions of law by an administrative law judge, and the issuance of an administrative law judge's decision, and submitted this case directly to the Board for findings of fact, conclusions of law, and the issuance of a Decision and Order. On August 14, 1997, the Board approved the stipulation of facts, granted the motion, and transferred this proceeding to the Board. The General Counsel and the Respondent filed briefs, and the General Counsel and the Union filed reply briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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On the entire record and the briefs, the Board makes the following

FINDINGS OF FACT[2]

I. JURISDICTION

The Respondent, Visiting Nurse Services of Western Massachusetts, Inc., is a corporation with an office and place of business in Holyoke, Massachusetts, and is engaged in the business of providing health care services to patients in their homes. Annually, the Respondent derives gross revenues in excess of $100,000 in the course of performing its services, and purchases and receives at its Holyoke facility goods valued in excess of $5000 directly from points outside the Commonwealth of Massachusetts. At all material times, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care provider within the meaning of Section 2(14) of the Act. The Union, Service Employees International Union, Local 285, AFL-CIO, CLC, has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

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2. In his reply brief, the General Counsel requests that certain factual assertions contained in the Respondent's brief be stricken, on the asserted grounds that they are outside the stipulated record. In making our findings of fact and in reaching our conclusions of law, we have relied only on facts within the stipulated record. Accordingly, we find it unnecessary to strike from the Respondent's brief any factual assertions that are outside the stipulated record. Rather, we have simply not considered any such factual assertions.

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II. ALLEGED UNFAIR LABOR PRACTICES

The issue presented is whether, during negotiations for a successor collective-bargaining agreement, the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing five of its proposals in the absence of an overall impasse in bargaining for the agreement as a whole. Specifically, the General Counsel alleges that the Respondent acted unlawfully when it implemented (1) a change from a weekly to a biweekly payroll schedule; (2) changes in job classifications; (3) changes in holiday pay; (4) a clinical ladders program; and (5) an enterostomal therapist classification and program.

A. *Stipulated Facts*

1. The unit

The following employees of the Respondent constitute a unit (the unit) appropriate for the purpose of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time professional employees, including nurses, public health nurses, physical therapists, and social workers, employed by the Respondent at its Holyoke, Massachusetts location, but excluding office clerical employees, home health aides, management personnel, and guards and supervisors as defined in the Act.

From about 1980, and at all material times, the Union has been the designated exclusive collective-bargaining

representative of the unit and has been recognized as the representative by the Respondent. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which (the contract) was effective from November 1, 1991, to October 31, 1992. At all times since about 1980, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.[3] Although no new collective-bargaining agreement has been reached since the expiration of the contract, the parties have reached periodic agreements, during the course of their negotiations, to implement such items as wage increases, changes in insurance plans, a tuberculosis plan, and dental insurance.

While the parties were engaged in negotiations for a new collective-bargaining agreement, a decertification petition was filed in late 1994, and a decertification election was conducted in January 1995. The Union won the election and a Certification of Representative was ultimately issued to the Union on December 20, 1996.

2. Negotiations and contemporaneous activity

Following the January 1995 election, the parties met and negotiated for a new contract on the following dates:

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3. Art. 1, *Recognition Clause*, of the contract states in relevant part that the Respondent recognizes the Union as the exclusive bargaining representative of the Holyoke employees "in accordance with the certification of the National Labor Relations Board, Region One certification date, November 10, 1980."

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1995	*1996*	*1997*
July 12	Feb. 29	Mar. 20
Aug. 11	Apr. 25	
Oct. 12	June 18	
Nov. 2		
Dec. 6		

With respect to the five items in issue, the relevant facts can be summarized as follows.

a. *October 12, 1995 session*[4]

The Respondent's vice president of Clinical Services, Deb Patulak, said that there was a need to have care delivered in "special areas." The contract sets forth only two classifications of nurses: registered nurses and senior staff nurses.[5] According to the Respondent's attorney, Bert Mason, there would be three separate seniority lists by classification when the proposed classifications went into effect. The Respondent would maintain these lists and provide them to the Union. Mason and Union Negotiator Glenn Daviau recognized that a change in classifications would "change weekends, holidays, vacations, everything else."

4. There is no evidence about the July 12 and August 11, 1995 negotiating sessions. The following accounts of statements made during the various negotiating sessions are based on the contemporaneous handwritten notes of the Union's codirector of its Health Care Division, Tom Higgins, and various Respondent representatives, all of whom attended these meetings.

5. Art. 42, *Rate of Pay and On-Call Rate*, secs. 1 and 2.

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The parties also discussed the Respondent's proposal to change from a weekly to a biweekly payroll system. The Respondent's vice president for finance, Diane Poole, assured the Union that the employees would not receive any less take-home pay under a biweekly payroll system than they received under the existing weekly payroll system. Poole agreed to provide the Union with comparative examples of take-home pay under a weekly versus a biweekly system. Daviau asked about the specifics of implementation of a change to biweekly payroll, and asked when the Respondent wanted to implement the change. Mason said not later than January 1996. Union Negotiator Nancy Geneczko said that "the employees are really concerned about this."

b. *November 2, 1995 session*[6]

The Respondent presented a written package proposal. On the first page, the proposal states in pertinent part:

> All proposals are and will be set forth based on a package bargaining basis. This means that if any portion of the package is unacceptable then the whole package is subject to revision. In this respect . . . if there are tentative agreements in a package but the whole package is not accepted then the tentative agreements are also subject to revision, deletion, addition, change etc. . . . all agreements will be subject to an acceptable total "final package" agreement . . . . [emphasis in original].

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6. All the following dates are within the period November 1995 through October 1996, unless otherwise stated.

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The proposal provided that the following language be added to the new contract, in regard to classifications:

> It is also understood and agreed to that the term classification is to be defined solely by the employer and that the employer has the absolute and unequivocal right to make the determination that classifications for employees within the bargaining unit have to be added, deleted, modified, changed or altered in any way, however the union has the right to bargain as to "the impact" of any such changes. [Emphasis in original.]

Union Negotiator Tom Holesovsky said that the Union was willing to bargain about classifications and operational needs. The Respondent supplied the Union with seniority lists by classification, as of October 31, in response to the Union's desire to see what the classifications proposed by the Respondent would look like.[7]

The proposal also provided for a 2-percent wage increase, to be effective November 6, and also provided "*PAYROLL TO BE BI-WEEKLY* [emphasis in original]."[8]

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7. There were six such lists: maternal child health (6 employees); physical therapist (1); senior staff nurses (3); social workers (5); hospice (5); and medical/surgical (39).

8. The parties stipulated that the Respondent proposed implementing this wage increase and change to biweekly payroll, both to be effective November 6, at either the November 2 or December 6 negotiating session, and that no agreement was reached regarding this proposal at either of these two sessions.

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Poole presented comparative weekly and biweekly payroll examples.

c. *December 6, 1995 session*

The Respondent presented another written package proposal, substantially identical in relevant part to those parts of the Respondent's November 2 written package proposal. The December 6 proposal also provided that the Respondent would have the sole and unqualified right to designate classifications as it deemed necessary based on operational needs.

Mason said that he did not think that implementing the proposed 2-percent wage increase, effective retroactively to November 6, would be a problem as long as the Union agreed to a biweekly payroll and the "classification issues." The parties then discussed the meaning and effect of, and possible changes in, the wording in the Respondent's proposal about seniority by classification.

d. *January 3, 1996 memorandum*

Poole sent a memo to all bargaining unit employees, stating "As we are contemplating implementing biweekly payroll, [the Union] requested during our last negotiation session that I distribute the following materials." Attached to the memo were copies of the biweekly payroll examples that the Respondent had presented to the Union at the November 2 negotiating session.

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e. *February 29, 1996 session*

Mason said that the Respondent was offering the 2-percent wage increase effective retroactively to November 6 in return for union agreement to the Respondent's proposals for a biweekly payroll system and the changes in classifications. The Union did not agree to this proposal. Holesovsky said that the Union had presented the biweekly payroll and classification issues to its membership. He said there were a lot of questions about classification and that the issue was fully discussed. Holesovsky said that classification was not really an issue with the employees in attendance at these meetings,[9] but that there was broad opposition within the membership to the proposal for biweekly payroll. The Respondent caucused, and on returning to the bargaining table, revised its wage offer by removing retroactivity to November 6, and proposing a 2-percent wage increase effective April 7. Mason said that retroactivity of a wage increase to November was no longer acceptable to the Respondent, but that there were no other changes to the Respondent's December 6 written package proposal.

f. *March-April 1996 correspondence*

On March 8, the Respondent distributed a memorandum, in question and answer format, to the unit employees, including stewards (this memo was not sent to the Union).

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9. Geneczko said that there bad been 2 meetings, and that there had been "scattered representation" of the approximately 75 unit employees.

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The memorandum discussed the Union's rejection of the Respondent's February 29 proposal. The memorandum concluded that "[n]egotiations will still continue as scheduled."

On March 21, Mason notified Higgins by letter that:

> [B]ased on economic and operational realities the Agency intends to implement "both" the wage increase and the bi-weekly pay proposals that, to date, we have been unable to agree on.

The letter further stated that the wage increase and change to biweekly payroll were to become effective on April 7 and May 3, respectively, and that:

> [B]oth of these proposals are being implemented as we do want our staff to be able to obtain their economic increases when they are normally due. In addition, the bi-weekly payroll proposal and its corresponding reduction in costs is intrinsically tied to the realities of cash flow concerns and the wage increase being provided.

If you have any questions, concerns or proposals concerning this matter, please do not hesitate to contact me.

On March 26, Higgins replied by letter to Mason, stating in pertinent part:

> We oppose the unilateral implementation of the bi-weekly payroll system. We request that the

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> Agency not implement the bi-weekly payroll system until we come to agreement in negotiations. . . . You have decided to tie your proposed two percent increase in employee wages to the implementation of a bi-weekly payroll system and we have rejected that combined proposal.

g. *May 1996 events*

The Respondent implemented the biweekly payroll system on May 3. Around that time, the unit employees presented management with a petition signed by 35 unit employees (there were approximately 60 unit employees at that time), expressing their opposition to a biweekly payroll system and their regret that the Respondent had decided to implement this system over the Union's objections.

h. *June 18, 1996 session*

The Respondent presented another written package proposal. The "WAGE PROPOSAL AND PAYROLL CHANGE" section of this proposal stated "Effective 7-7-96 2% increase to base rates of employees on the payroll as of the date of ratification.[10] **PAYROLL TO REMAIN BI-WEEKLY**" [emphasis in original]. The proposed language concerning seniority by classification that was newly added to the December 6 written package proposal was carried over into the June 18 written package proposal.

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10. This proposed 2-percent wage increase to be effective July 7 was in addition to the 2-percent wage increase already implemented effective April 7.

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The proposal also contained three new provisions, in regard to holidays, clinical ladders, and an enterostomal therapist classification and program.[11] Specifically, the proposal stated in pertinent part that the Respondent would remain open on Presidents Day, Patriots Day, and Columbus Day, and these holidays would become floating holidays that would be taken at a time requested by the employee, subject to approval by the supervisor involved. As for clinical ladders, the proposal provided that they were to be implemented by management as added incentive and income for quality performance and achievement as determined by management. The total clinical ladders program was to be subject to management discretion and none of its provisions or applications would be subject to grievance or arbitration. Finally, in regard to the enterostomal therapist classification and program, the proposal provided that it was to be implemented as determined by management, not subject to grievance or arbitration in any way and not subject to any of the provisions of the collective-bargaining agreement. Bargaining unit staff would be selected as determined by management and compensation was to be determined by management with the agreement that no bargaining unit staff would suffer a reduction in compensation by assignment to this program.

In addition to the total package proposed by the Respondent, it also proposed, in the alternative, another,

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11. Enterostomal means relating to or having undergone an enterostomy. *Dorland's Illustrated Medical Dictionary* 524 (25th ed. 1974). An enterostomy is a surgical operation in which a permanent opening in the intestine is made through the abdominal wall. *Medical Dictionary for Lawyers* 274 (3d ed. 1960).

much smaller package, containing items that the Respondent believed could be agreed on separate from a complete new collective-bargaining agreement. Thus, the proposal concluded that, in the alternative, in order to provide an increase to bargaining unit personnel and to allow the parties to continue bargaining as to a complete contract, the Respondent was willing to provide a 2-percent increase to base rates of employees on the payroll on July 7, 1996, and to continue bargaining for a complete contract as long as the wage increase and the above proposals on holidays, clinical ladders, and enterostomal therapist and classification program were agreed to while bargaining continued.

The Union asked questions about this alternative package, but was unable to agree to the proposal at that time. Due to a scheduling conflict, the Respondent had to conclude the session after an hour. The next negotiating session was scheduled for July 17.

i. *June-November 1996*

The Union canceled the July 17 session because it wanted to meet with its members to discuss the Respondent's June 18 proposals, but was unable to do so before July 17 because of vacation conflicts. No new session was scheduled by either party.

At a July 24 clinical staff meeting, Patulak discussed and distributed information about the proposed clinical ladder program. The handout describing the clinical ladder program states in pertinent part that:

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> Clinical ladders are practices and achievements that are above and beyond one's standard job performance. Clinical Ladders enhance professional practice, ultimately improving patient care to individuals and families in the community. A monetary incentive accompanies each Step Level (to be determined). Each individual that meets the criteria for a Step on the clinical ladder will receive a monetary reward, professional recognition, and certificate of achievement. . . . This is a voluntary program.

In an August 20 letter to Higgins from the Respondent's vice president for operations, Elizabeth Stroshine, the Respondent advised the Union that "as of September 6, 1996, the agency is contemplating implementing the following": (1) a 2-percent wage increase, retroactive to July 7; (2) starting January 1, 1997, the agency to remain open on Presidents' Day, Patriots' Day, and Columbus Day, with those holidays becoming personal floating holidays for employees to take at a time they request, subject to supervisory approval; (3) the clinical ladders program; and (4) the enterostomal therapist classification and program. Stroshine's letter concludes:

> [I]f you have any questions, concerns or proposals in regard to the above, please do not hesitate to contact me. To the best of my knowledge all of the above items are the "positives" that we discussed that could be implemented while bargaining for a successor agreement continued.

In response to this letter, Union Representative Tim DiSilva wrote to Mason on September 5, stating in pertinent part:

> We oppose the unilateral implementation of these proposals. The Union requests that you *not* make any changes to wages, hours or working conditions. Please do not hesitate to call me to arrange a meeting as soon as possible to discuss this and other outstanding issues [emphasis in original].

This letter was delivered to Mason on September 5.

In a September 13 memorandum from Stroshine to the bargaining unit, including stewards (but not sent to the Union), the Respondent informed the employees that it had implemented the alternative package that it proposed on June 18, and referred to in its August 20 letter to the Union (i.e., (1) the 2-percent wage increase, retroactive to July 7; (2) the change in holidays, as described above; (3) the clinical ladders program; and (4) the enterostomal therapist classification and program). Stroshine's memorandum concluded by stating that "To our knowledge, we properly implemented this package of positive items that would benefit the agency as a whole."

In a September 23 letter from Mason to DiSilva, the Respondent advised the Union that the items involved were "items that had to be put into process for implementation on [September 6] . . . and . . . are already in process." The letter further stated that:

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> [T]he items selected for implementation are only "positive items" . . . only meant to enhance the economic condition of the staff while bargaining on a complete contract continued. This is something that we have done before. . . .[12] [I]t is the Agency's position that the mini package involved has been properly implemented. . . .

In the summer of 1996, the Respondent sought a volunteer from among the unit employees to attend an enterostomal therapy certification program, and Sherry Ferro, an RN in the unit, volunteered to attend the program. She attended classroom sessions Monday through Friday, during her normal working hours, between October 7 through November 1, 1996. After completing the classroom session, she performed a preceptorship until about February 1997. The Respondent paid the cost of this training and also paid Ferro her full regular wages during the entire period of her training. In turn, she was required to commit to at least 3 years of continued employment with the Respondent.

j. *1997*

The Respondent and the Union met and negotiated a change in insurance plans on March 20, 1997. The parties filed their stipulation of facts and motion to transfer this proceeding to the Board on June 13, 1997, in which they stipulated (1) that the Respondent has not presented a "final"

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12. During the course of their negotiations over the years, the parties have reached periodic agreements to implement wage increases.

offer to the Union; (2) that no party has yet claimed that impasse has been reached on the entire contract; (3) that the Respondent asserts that impasse has been reached on the biweekly payroll, clinical ladders, floating holidays, enterostomal classification and program, and classifications; and (4) that the Union asserts that impasse has not been reached on these five items.

B. *Contentions of the Parties*

1. The General Counsel

The General Counsel contends that the Respondent violated Section 8(a)(5) and (1) of the Act, during negotiations with the Union for a collective-bargaining agreement, by unilaterally implementing the change to a biweekly payroll system on May 3; changes in classifications sometime subsequent to May 3; and a change in paid holiday structure as well as new clinical ladder and enterostomal therapist classification programs between August 20 and September 6, all without first either securing the agreement of the Union or bargaining to impasse on the entire contract. As authority for his position, the General Counsel relies primarily on *Bottom Line Enterprises*, 302 NLRB 373 (1991).

2. The Respondent

The Respondent contends that "unilateral implementation of changes . . . is not a violation of the duty to bargain collectively, even in the absence of impasse, if the employer notifies the union that it intends to institute the change and

gives the union the opportunity to respond to that notice."[13] The Respondent argues that the Board should apply this "notice and opportunity to bargain" standard in the instant case and find that any unilateral changes the Respondent implemented were not in violation of the Act. More specifically, the Respondent contends that it (1) notified the Union in writing of the contemplated changes; (2) subsequently discussed these contemplated changes with the Union during negotiating sessions; (3) failed to obtain the Union's agreement to the changes; and (4) unilaterally decided to implement the changes. The Respondent also argues that there is no evidence that it made any changes at all with respect to clinical ladders and the enterostomal therapist classification and program.

The Respondent further contends that the complaint allegation concerning the change to a biweekly payroll system is procedurally barred by Section 10(b) of the Act.

C. *Analysis and Conclusions*

1. The Respondent's 10(b) argument

On September 30, 1996,[14] the Union filed the initial charge alleging that "[o]n or about September 6, 1996," the

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13. Quoting *NLRB v. Pinkston-Hollar Construction Services*, 954 F.2d 306, 311 (5th Cir.1992), denying enf. and remanding *Pinkston-Hollar Construction Services*, 298 NLRB 1 (1990) (*Pinkston-Hollar I*), decision on remand *Pinkston-Hollar Construction Services*, 312 NLRB 1004 fn. 4 (1993) (*Pinkston-Hollar II*).

14. All dates in this section of the decision discussing the 10(b) issue are in 1996.

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Respondent violated Section 8(a)(5) and (1) by making "unilateral changes to the wages, hours and working conditions of bargaining unit employees."[15] The complaint alleges that on May 3 (less than 6 months prior to the filing of the initial charge) the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing a biweekly payroll system.

In deciding whether a charge allegation provides a sufficient basis for a complaint allegation, the Board examines whether the allegations that are asserted to be barred by Section 10(b) are "closely related" to the allegations of a timely filed charge. In applying this test, the Board considers the following factors: (1) whether the allegations involve the same legal theory; (2) whether the allegations arise from the same factual circumstances or sequence of events; and (3) whether the respondent would raise similar defenses to both allegations. See *Dynatron/ Bondo Corp.*, 324 NLRB No. 98 (Sept. 30, 1997); *Redd-I, Inc.*, 290 NLRB 1115 (1988).

Applying this test, we find that all of these factors are satisfied here. First, the allegations involve the same section of the Act (Sec. 8(a)(5)) and the same legal theory (circumvention of the collective-bargaining process). Second, the allegations involve similar conduct (changing employee terms and conditions of employment) occurring during the May through September time period when the parties were engaged in negotiations for a successor

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15. An amended charge specifically alleging that the change to a biweekly payroll system violated Sec. 8(a)(5) was not filed until November 12, more than 6 months after May 3, the date the parties stipulated the change occurred.

collective-bargaining agreement. Third, as discussed above, the Respondent has raised common defenses to both the payroll change and the other allegedly unlawful unilateral changes. Accordingly, we find that the May 3 unilateral change allegation in the complaint is not barred by Section 10(b).

2. Alleged 8(a)(5) unilateral changes

a. *Applicable principles*

As summarized above, there is a basic disagreement between the parties as to the legal standard that should be applied here. Although the Respondent relies on the "notice and opportunity to bargain" standard of the Fifth Circuit's *Pinkston-Hollar* decision, the Board did not adopt that standard in *Pinkston-Hollar II*,[16] and we decline the Respondent's invitation to do so now.[17] Rather, we agree

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16. 312 NLRB 1004 fn. 4.

17. *Kentron of Hawaii*, 214 NLRB 834 (1974), and *Jim Walter Resources*, 289 NLRB 1441 (1988), relied on by the Respondent, are distinguishable.

In *Kentron of Hawaii*, the employer was found to have lawfully implemented a unilateral discontinuation of employee benefits for newly represented unit employees prior to the start of negotiations for an initial collective-bargaining agreement with the newly certified union. The Board found that the union failed to act with due diligence in response to the employer's notification to the union, 11 days after the union's certification as bargaining representative, that the employer intended to discontinue the benefits in question 3 weeks from the date of the notification.

(Cont'd)

with the General Counsel that as a general rule, when, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide a union with notice and an opportunity to bargain about a particular subject matter before implementing such changes. Rather, an employer's obligation under such circumstances encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole.[18] There are two

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(Cont'd)

In *Jim Walter Resources*, the employer was found to have lawfully implemented a unilateral discontinuation of its payment of medical insurance premiums for employees receiving disability payments during a strike, following expiration of the collective-bargaining agreement requiring the payment of such premiums and during a period when the parties were not in negotiations for a successor collective-bargaining agreement. The Board found that the union failed to act with due diligence in response to the employer's notification to the union of the employer's intent to discontinue the payments 10 days before the effective date of the discontinuation.

In the instant case, however, unlike in *Kentron of Hawaii* and *Jim Walter Resources*, the parties were actively engaged in negotiations for a collective-bargaining agreement at the time of the Respondent's unilateral changes.

18. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. *Master Window Cleaning, Inc. v. NLRB*, 15 F.3d 1087 (9th Cir.1994) (negotiations for a successor collective-bargaining agreement); *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995) (negotiations for an initial collective-bargaining agreement).

limited exceptions to that general rule: (1) when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, or (2) when economic exigencies or business emergencies compel prompt action.[19]

b. *Conclusions*

The parties stipulated that impasse has not been reached on bargaining for the agreement as a whole. Therefore, under the principles set forth above, the Respondent was obligated to refrain from making unilateral changes in unit employees' terms and conditions of employment.

The record clearly shows that the Respondent failed to fulfill that obligation and instead unilaterally implemented its contract proposals in five subject areas. Thus, with respect to the Respondent's proposed change to a biweekly payroll system, the Union notified the Respondent in writing on March 26, 1996,[20] that it opposed the change and requested that the Respondent not implement it until the parties could come to an agreement in negotiations. On April 2, however,

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19. *RBE Electronics of S.D.*, supra, 320 NLRB at 81; *Bottom Line Enterprises*, supra, 302 NLRB at 374.

Chairman Gould would also require an employer to show a compelling and substantial justification for such conduct even in these limited circumstances. See *RBE Electronics of S.D.*, supra at 82 fn. 12.

20. All the following dates are within the period November 1995 through October 1996, unless otherwise stated.

the Respondent notified the Union that it had decided to implement the biweekly payroll, and on May 3 it did so, despite the fact that the parties did not come to an agreement in negotiations about this change.

With respect to the Respondent's proposals to change the holidays provision in the expired contract and establish both a clinical ladders program and an enterostomal therapist classification and program, the Union notified the Respondent in writing on September 5 that it opposed the unilateral implementation of these proposals, requested the Respondent not to make any changes in wages, hours, or working conditions, and invited the Respondent to contact the Union to arrange a meeting as soon as possible to discuss this and other outstanding issues. On September 13, however, the Respondent notified the unit employees in writing (not sent to the Union) that it had implemented the change in holidays, the clinical ladders program, and the enterostomal therapist classification and program. On September 23 the Respondent notified the Union in writing that it had implemented this change and these programs, effective September 6.[21] Just as with the biweekly payroll system, the Respondent made these changes without the agreement of Union and absent an overall impasse. Subsequently, in October, the Respondent, without consulting the Union, sent Registered Nurse Sherry Ferro to an enterostomal therapy

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21. The Respondent's September 13 and 23 communications are part of the stipulated record. Accordingly, the Respondent is clearly incorrect in its assertion that there is no record evidence that it made any change with respect to clinical ladders and the enterostomal therapist classification and program.

certification program at the Respondent's expense and with full pay.

Finally, with regard to proposed changes in the contractual classification of nurses as RNs or senior staff nurses, the record shows that signups for nurses for holidays, weekends, and vacations are currently done by departmental classifications, i.e., Hospice Life Care; Medical — Surgical; and Maternal Child Health. These are the same three nursing department classifications for which the Respondent provided the Union with seniority lists at the November 2 negotiating session, to show the Union what the Respondent's proposed classifications would look like. The record shows no agreement by the parties to these changes. Accordingly, we find that the Respondent implemented changes in job classifications without the agreement of the Union and in the absence of overall impasse.

As to the two exceptions to the general rule, we find that neither is applicable. Thus, the Respondent does not contend, and the record does not show, either (1) that the Union was avoiding or delaying bargaining or (2) that economic exigencies compelled the Respondent promptly to implement the unilateral changes in question.

Therefore, under the general rule applicable here, the Respondent was prohibited from unilaterally implementing the above changes in employee terms and conditions of employment during negotiations for the collective-bargaining agreement, and the Respondent has violated Section 8(a)(5) and (1) of the Act in doing so.

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CONCLUSIONS OF LAW

1. The Respondent, Visiting Nurse Services of Western Massachusetts, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Service Employees International Union, Local 285, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of the Respondent constitute a unit (the unit) appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time professional employees, including nurses, public health nurses, physical therapists, and social workers, employed by the Respondent at its Holyoke, Massachusetts location, but excluding office clerical employees, home health aides, management personnel, and guards and supervisors as defined in the Act.

4. At all times since about 1980, based on Section 9(a) of the Act, the Union has been the exclusive collective-bargaining representative of the unit.

5. The Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally implementing a biweekly payroll system on or about May 3, 1996; unilaterally implementing changes in holidays on or about September 6, 1996; unilaterally implementing a clinical ladders program and an

enterostomal therapist classification and program on or about September 6, 1996; and unilaterally implementing changes in classifications during the time material, all at a time when the Respondent was in negotiations with the Union for a collective-bargaining agreement, and all in the absence of overall impasse over the entire collective-bargaining agreement.

6. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act. More specifically, having found that the Respondent unilaterally implemented a biweekly payroll system, a change in holidays, a clinical ladders program, an enterostomal therapist classification and program, and new classifications, all at times when it was prohibited under the Act from doing so, as fully discussed above, we shall order the Respondent, on request of the Union, to bargain collectively and in good faith with the Union on these and other terms and conditions of employment of unit employees and, if an understanding is reached, to embody it in a signed agreement. Further, we shall order the Respondent, if requested to do so by the Union, to rescind the unlawful unilateral changes, to reinstate the terms and conditions of employment in these areas that existed before the Respondent's unlawful unilateral changes, and to make the unit employees whole for any losses

attributable to its unlawful conduct. Backpay shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir.1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). To the extent that the unlawful unilateral changes implemented by the Respondent may have improved the terms and conditions of employment of unit employees, the Order set forth below shall not be construed as requiring the Respondent to rescind such improvements unless requested to do so by the Union.

The General Counsel and the Union have requested certain additional remedies.

a. *Extension of the certification year*

As seen, a Certification of Representative was issued to the Union on December 20, 1996, after it won a January 1995 decertification election. The General Counsel, joined by the Union and citing *Mar-Jac Poultry*, 136 NLRB 785 (1962), contends that the effects of the Respondent's unlawful unilateral implementation of changes in terms and conditions of employment tainted negotiations during the ensuing certification year, and that the Union should therefore be given the protection of a new certification year in which to bargain without fear of another decertification petition being filed, and free of unfair labor practices.

We find that the record fails to establish that an extension of the certification year is warranted here. There is no support in the record for the General Counsel's contention that the Respondent's unlawful unilateral implementation of changes

in terms and conditions of employment in 1996 tainted negotiations during the ensuing certification year. Indeed, the only record evidence of events subsequent to the December 20, 1996 certification shows that the parties had a negotiating session on March 20, 1997, at which they agreed upon a change in insurance plans. Citing this March 1997 negotiating session, the General Counsel acknowledges in his brief that "the parties continue to meet and negotiate." Likewise, the Union asserts in its brief that the Respondent "has continued to bargain well after [its] unilateral actions." Thus, the General Counsel and the Union do not contend, and the record does not show, that the Respondent has failed or refused to recognize the Union or to meet and bargain with the Union in good faith following the Union's certification. Nor does the record show that the Respondent's unlawful unilateral implementation of changes in terms and conditions of employment in 1996 tainted negotiations during the ensuing certification year. The requested *Mar-Jac* remedy is therefore not supported by the record.[22]

b. *Negotiating costs*

The Union contends in its brief that the Respondent has engaged in conduct here and in prior proceedings that is "flagrant, aggravated, persistent, and pervasive," and that the Union has spent extensive time and resources engaging in bargaining that was continually set back by first the threat of, and then the consummation of, unlawful unilateral action. More specifically, the Union contends that bargaining from

22. *Cortland Transit*, 324 NLRB No. 66 (Sept. 18, 1997); *Tocco, Inc.*, 323 NLRB No. 72, slip op. at fn. 1 (Apr. 18, 1997).

October 1995 until "the present" (i.e., the December 16, 1997 filing of its brief to the Board) has been marred and side-tracked by the Respondent's resort to the above unlawful conduct. The Union contends that the Respondent has deliberately attempted to isolate certain decisions from the vast majority of others and has flagrantly disregarded the Union's legitimate role. Thus, the Union contends that the policies of the Act will not be effectuated fully unless the Respondent makes the Union whole by reimbursing the Union for the costs of its negotiations with the Respondent.

The Union relies on *Frontier Hotel & Casino*[23] in support of its request that the Respondent be ordered to reimburse the Union's negotiating costs. There the Board found that the employer engaged in flagrant, egregious, deliberate, and pervasive bad-faith conduct aimed at frustrating the bargaining process, causing the union to waste its resources in a futile effort to bargain for an agreement that the employer never intended to reach, and rendering the bargaining between the parties "merely a charade."[24] The Board held that an order requiring a respondent to reimburse a charging party for negotiation expenses will be warranted in cases of unusually aggravated misconduct, where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of the bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies.[25]

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23. 318 NLRB 857, 858 (1995), enfd. in relevant part sub nom. *Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C.Cir.1997).

24. 318 NLRB at 858.

25. Id. at 859.

Applying that principle here, we find that the record fails to establish that an award of negotiating costs to the Union is warranted. The record, as fully discussed above, does not show that the Respondent has engaged in flagrant, egregious, deliberate, pervasive bad-faith conduct aimed at frustrating the bargaining process or causing the Union to waste its resources in a futile effort to bargain for an agreement that the Respondent never intended to reach. Nor does the record show that the bargaining between the parties was merely a charade. The General Counsel does not allege, and the record does not show, surface bargaining on the part of the Respondent. Rather, the record shows that the parties met in a series of nine formal negotiating sessions during the period August 1995 through March 1997, and that they also corresponded with each other during that time. The record also shows, and both the General Counsel and the Union acknowledge, that the parties have continued to meet, negotiate and bargain during 1997, well after the Employer's unilateral actions. Under all of these circumstances, we do not find that reimbursement of the Union's negotiating costs by the Respondent has been shown to be warranted.

c. *Broad order*

Both the General Counsel and the Union have requested the issuance of a broad remedial order against the Respondent. We find that a broad order is warranted here.

In *Hickmott Foods*, 242 NLRB 1357 (1979), the Board held that an order broadly requiring a respondent to cease and desist from restraining or coercing employees in the exercise of their Section 7 rights "in any other manner" (i.e.,

rather than more narrowly "in an any like or related manner") is warranted only when a respondent (1) has shown a proclivity to violate the Act or (2) has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees' fundamental statutory rights. As fully discussed above, we have effectively found that the Respondent's unfair labor practices here do not come within the second category under *Hickmott Foods*. We do find, however, that the Respondent has shown a continued proclivity to violate the Act, and we shall issue a broad remedial order on that basis. More specifically, in April 1994, about 2 years before the May 3, 1996 onset of the Respondent's unlawful activity in this case, the Board issued a broad remedial order against the Respondent in another proceeding, based on the Respondent's proclivity to violate the Act.[26] Inasmuch as the Respondent has continued to violate the Act in this case, notwithstanding the broad remedial order issued against it in the previous case, we find a broad remedial order to be fully warranted here.

ORDER

The Board orders that the Respondent, Visiting Nurse Services of Western Massachusetts, Inc., Holyoke, Massachusetts, its officers, agents, successors, and assigns, shall

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26. *Holyoke Visiting Nurses Assn.*, 313 NLRB 1040, 1054 fn. 9 (1994), citing *Holyoke Visiting Nurses Assn. v. NLRB*, 11 F.3d 302 (1st Cir.1993), enfg. 310 NLRB 684 (1993). As noted above, the Respondent changed its corporate name from Holyoke Visiting Nurses Association, Inc. (Holyoke) to its present name in about May 1996, and the parties have stipulated that the Respondent is identical to Holyoke.

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1. Cease and desist from

(a) Failing and refusing to bargain collectively with Service Employees International Union, Local 285, AFL-CIO, CLC as the exclusive bargaining representative of the employees in the following appropriate unit by unilaterally implementing changes in terms and conditions of employment during negotiations for a collective-bargaining agreement in the absence of overall impasse on the entire agreement:

> All full-time and regular part-time professional employees, including nurses, public health nurses, physical therapists, and social workers, employed by the Respondent at its Holyoke, Massachusetts location, but excluding office clerical employees, home health aides, management personnel, and guards and supervisors as defined in the Act.

(b) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain collectively and in good faith with the Union as the exclusive representative of all the employees in the appropriate unit described above concerning terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

(b) On request of the Union, rescind the unlawfully implemented change to a biweekly payroll system, changes in holidays, clinical ladders program, enterostomal therapist classification and program, and changes in classifications, reinstate the terms and conditions of employment in these areas that existed before the Respondent's unlawful unilateral changes, and make the unit employees whole for any losses attributable to its unlawful conduct in the manner set forth in the remedy section of this decision.

(c) Within 14 days after service by the Region, post at its Holyoke, Massachusetts facility copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 3, 1996.

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27. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. July 20, 1998

William B. Gould IV, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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MEMBER BRAME, dissenting.

Contrary to my colleagues, I find that the stipulated record provides an insufficient basis for deciding the issues presented in this case. Therefore, I would find that the motion to transfer this proceeding to the Board was improvidently granted and would remand the proceeding for a full evidentiary hearing before an administrative law judge.

The complaint alleges that the Respondent, in violation of Section 8(a)(5) and (1), unilaterally implemented certain bargaining proposals during the process of negotiations for a new collective-bargaining agreement with the Union. In my view, the adjudication of these matters requires a more complete understanding of the bargaining that took place between the parties than can be gleaned from the stipulated facts. Specifically, I find that the often cryptic and sometimes conflicting bargaining notes, provided as exhibits to the stipulation of facts, are an unsatisfactory substitute for testimonial evidence by participants in the negotiations, particularly where, as here, the parties have not stipulated that all or any of the notes accurately reflect the parties' discussions in bargaining. For this reason, I do not agree with the Board's decision, in which I did not participate, to accept the stipulation of facts and grant the motion to transfer the proceeding to the Board. Accordingly, I dissent from my colleagues' present decision finding that the Respondent committed the violations alleged in the complaint.

Dated, Washington, D.C. July 20, 1998

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J. Robert Brame III, Member

NATIONAL LABOR RELATIONS BOARD

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APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to bargain collectively with Service Employees International Union, Local 285, AFL-CIO, CLC as the exclusive bargaining representative of our employees in the following appropriate unit by unilaterally implementing changes in terms and conditions of employment during negotiations for a collective-bargaining agreement in the absence of overall impasse on the entire agreement:

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All full-time and regular part-time professional employees, including nurses, public health nurses, physical therapists, and social workers, employed by Visiting Nurse Services of Western Massachusetts, Inc., at our Holyoke, Massachusetts location, but excluding office clerical employees, home health aides, management personnel, and guards and supervisors as defined in the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain collectively and in good faith with the Union as the exclusive representative of all the employees in the appropriate unit described above on terms and conditions of employment and, if an understanding is reached, embody it in a signed agreement.

WE WILL, on request of the Union, rescind the unlawfully implemented change to a biweekly payroll system, changes in holidays, clinical ladders program, enterostomal therapist classification and program, and changes in classifications, reinstate the terms and conditions of employment in these areas that existed before our unlawful unilateral changes, and make the unit employees whole for any losses attributable to our unlawful conduct.

VISITING NURSE SERVICES OF WESTERN MASSACHUSETTS, INC.

No. 99-520

In the Supreme Court of the United States

VISITING NURSE SERVICES OF WESTERN MASSACHUSETTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 285, AFL-CIO, CLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner violated its duty to bargain in good faith by unilaterally altering the unit employees' terms and conditions of employment during negotiations with the union for a new contract without first reaching an impasse in bargaining for that agreement.

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In the Supreme Court of the United States

No. 99-520

VISITING NURSE SERVICES OF
WESTERN MASSACHUSETTS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD
AND SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 285, AFL-CIO, CLC

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-21a) is reported at 177 F.3d 52. The decision and order of the National Labor Relations Board (Pet. App. 22a-59a) is reported at 325 N.L.R.B. No. 212.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1999. The petition for a writ of certiorari was filed on August 23, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner provides health care services to individuals in their homes. Pet. App. 24a. Since 1980, Local 285, Service Employees International Union (Union) has been the certified bargaining representative of a unit consisting of petitioner's professional employees, including nurses, physical therapists, and social workers. *Id.* at 25a-26a & n.3. The parties' most recent collective bargaining agreement expired on October 31, 1992. *Id.* at 26a. Between July 1995 and March 1997, petitioner and the Union conducted a number of negotiating sessions in an effort to reach a new contract. *Id.* at 2a, 26a-39a.

At a bargaining session held on November 2, 1995, petitioner presented the Union with a written "package" proposal. That proposal contained a two percent wage increase, a switch from a weekly to a bi-weekly payroll system, and changes to employee job classifications. Pet. App. 3a, 28a-30a. Petitioner's proposal further provided:

> All proposals are and will be set forth based on a package bargaining basis. This means that if any portion of the package is unacceptable then the whole package is subject to revision. In this respect . . . if there are tentative agreements in a package but the whole package is not accepted then the tentative agreements are also subject to revision, deletion, addition, change, etc. . . . *[A]ll agreements will be subject to an acceptable total "final package" agreement.*

Id. at 3a. The Union did not accept petitioner's "package" proposal but expressed a willingness to bargain about the job classification changes. *Id.* at 3a-4a. At a negotiating session on December 6, petitioner made a

proposal "substantially identical" to that of November 2. The parties discussed the job classification issue but did not reach an agreement. *Id.* at 4a, 30a.

On February 29, 1996, petitioner again offered the Union a "package" proposal for a two percent wage increase (retroactive to November 6, 1995), a bi-weekly payroll system, and job classification changes. Pet. App. 4a, 31a. The Union rejected that proposal because the employees opposed a bi-weekly payroll system. *Ibid.* However, on March 21, petitioner informed the Union that it intended to implement both "the wage increase and the bi-weekly pay proposals that, to date, we have been unable to agree on." *Id.* at 4a, 32a. On March 26, the Union advised petitioner that it "oppose[d] the unilateral implementation of the bi-weekly payroll system," stating: "You have decided to tie your proposed two percent increase in employee wages to the implementation of a bi-weekly payroll system and we have rejected that combined proposal." *Id.* at 4a, 32a-33a. The Union asked that petitioner "not implement the bi-weekly payroll system until we come to agreement in negotiations." *Id.* at 33a. Despite the Union's request, however, petitioner unilaterally implemented the wage increase on April 7 and the bi-weekly payroll system on May 3. *Id.* at 4a.

On June 18, 1996, petitioner presented the Union with another "package" proposal, as well as with an alternative "mini package." Pet. App. 4a-5a, 33a-35a. This "package" proposal retained petitioner's earlier job classification changes and included a second two percent wage increase; it also added three new provisions regarding "floating" holidays, a "clinical ladders" program, and an enterostomal therapist classification and program. *Id.* at 4a-5a, 33a-34a. The "mini package" contained all the proposals in the full

"package" proposal, except for the job classification changes. *Id.* at 5a, 35a. The parties did not reach agreement on either of these proposals. *Ibid.*

On August 20, 1996, petitioner informed the Union that, effective September 6, it planned to implement the "mini package" unilaterally. The Union again asked petitioner not to "make any changes to wages, hours or working conditions," and requested petitioner "to arrange a meeting as soon as possible to discuss this and other outstanding issues." Pet. App. 5a, 36a-37a. On September 13, however, petitioner sent a memorandum to the employees (but not to the Union) informing them that petitioner had implemented the "mini package." *Id.* at 6a, 37a.

2. Acting on charges filed by the Union, the General Counsel of the National Labor Relations Board (Board) issued a complaint alleging that petitioner violated Section 8(a)(1) and (5) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(a)(1) and (5), by unilaterally implementing the following proposals in the absence of an overall impasse in bargaining for a new agreement as a whole: (1) the bi-weekly payroll system, (2) changes in job classifications, (3) changes in holiday pay, (4) the clinical ladders program, and (5) the enterostomal therapist classification and program. Pet. App. 22a, 25a. Petitioner, the Union, and the General Counsel waived a hearing before an administrative law judge and submitted the matter to the Board for adjudication based on a stipulated factual record. *Id.* at 23a.

The Board sustained the allegations of the complaint. Pet. App. 42a-48a. The Board rejected petitioner's contention that "unilateral implementation of changes . . . is not a violation of the duty to bargain collectively, even in the absence of impasse, if the employer

notifies the union that it intends to institute the change and gives the union the opportunity to respond to that notice." *Id.* at 39a-40a & n.13 (quoting *NLRB* v. *Pinkston-Hollar Constr. Servs.*, 954 F.2d 306, 311 (5th Cir. 1992). The Board noted that it has not adopted the "notice and opportunity to bargain" standard articulated in *Pinkston-Hollar*, and it "decline[d] [petitioner's] invitation to do so now." *Id.* at 42a. Rather, the Board explained:

> [A]s a general rule, when, as here, parties are engaged in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to provide a union with notice and an opportunity to bargain about a particular subject matter before implementing such changes. Rather, an employer's obligation under such circumstances encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole.

Id. at 43a.[1]

Observing that "[t]he parties have stipulated that impasse has not been reached on bargaining for the agreement as a whole" (Pet. App. 44a), the Board found that each of the unilateral changes challenged in the complaint had been implemented by petitioner "without

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[1] The Board added that "[t]here are two limited exceptions to that general rule: (1) when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, or (2) when economic exigencies or business emergencies compel prompt action." Pet. App. 43a-44a. The Board found, however, that "[petitioner] does not contend, and the record does not show" that either exception applies to this case. *Id.* at 46a.

the agreement of the Union and in the absence of an overall impasse." *Id.* at 45a-46a; see also *id.* at 48a. Accordingly, the Board concluded that, "under the general rule applicable here, [petitioner] was prohibited from unilaterally implementing" the challenged changes in employment terms. *Id.* at 46a. To remedy petitioner's unfair labor practices, the Board ordered petitioner, among other things, "to reinstate the terms and conditions of employment in these areas that existed before [petitioner's] unlawful unilateral changes," at the Union's request. *Id.* at 48a; see also *id.* at 55a.[2]

3. The court of appeals enforced the Board's order. Pet. App. 1a-21a. As had the Board, the court rejected petitioner's contention, based on *Pinkston-Hollar*, *supra*, that "once [petitioner] had given the Union notice of its position on a particular issue and an opportunity to respond, it was free to unilaterally declare impasse on specific issues and to take action." *Id.* at 9a. Rather, the court concluded that the Board's approach—*i.e.*, that, as a general rule, the employer may not act unilaterally "absent overall impasse on bargaining for the agreement as a whole" (*id.* at 10a)—is "both rational and consistent with the NLRA and so is entitled to deference." *Id.* at 14a.[3]

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[2] Board Member Brame, dissenting, found that "the stipulated record provides an insufficient basis for deciding the issues presented in this case"; thus, he would have remanded the proceeding for a full evidentiary hearing before an administrative law judge. See Pet. App. 57a.

[3] The court noted that "[t]here may be instances where one or two issues so dominate and drive the collective bargaining negotiations that the Board would be justified in finding that impasse on those one or two issues amounts to a bargaining deadlock." Pet.

The court further concluded that *Pinkston-Hollar*, upon which petitioner relied to justify its unilateral changes, "is inconsistent with the approach taken by this Circuit." Pet. App. 14a. The court added (*ibid.*) that *Pinkston-Hollar* is "best understood as [a case] where the court found that the union failed to bargain and to act with due diligence after being given the employer's proposal." The court observed, however, that "[petitioner] does not argue here that the Union avoided or delayed bargaining and so *Pinkston-Hollar* is, even on its own terms, inapplicable." *Ibid.*

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Section 8(d) of the National Labor Relations Act (NLRA or Act), 29 U.S.C. 158(d), defines the duty to bargain as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5), makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." As this Court has recognized, "Congress made a conscious decision" in Section 8(d) to delegate to the Board "the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain." *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 496 (1979). "If the

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App. 12a. The court also concluded, however, that "that is a far cry from this case." *Ibid.*

Board adopts a rule that is rational and consistent with the Act, * * * then the rule is entitled to deference from the courts." *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U.S. 27, 42 (1987).

In this case, the Board adhered to its long-standing position that, as a general rule, the duty to bargain in good faith under Sections 8(a)(5) and (d) obligates the employer, during negotiations for a collective bargaining agreement, to bargain to impasse with the union for that agreement before making unilateral changes to existing employment terms. See Pet. App. 43a. As the Board held in *Winn-Dixie Stores, Inc.*, 243 N.L.R.B. 972 (1979), a rule that would permit the employer to make unilateral changes "regardless of the status of negotiations with [the union], as soon as the [union] was notified of the intended change and given an opportunity to discuss it," is "clearly in disparagement of the collective-bargaining process." *Id.* at 974. For, "[b]y utilizing this approach with respect to various employment conditions *seriatim*, an employer eventually would be able to implement any and all changes it desired regardless of the state of negotiations between the [union] and itself," thereby precluding "meaningful collective bargaining" and "effectively vitiat[ing]" the union's role in the collective bargaining process. *Ibid.* "Such tactics," the Board concluded, "amount to little more than a ritual or *pro forma* approach to bargaining and hardly constitute the 'kind of rational exchange of facts and arguments which increases mutual understanding and then results in agreement.'" *Id.* at 974-975 (quoting Archibald Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1433 (1958)).

The court of appeals below articulated similar reasons for upholding the Board's impasse rule and rejecting petitioner's proposed "notice and opportunity to

bargain" standard. See Pet. App. 13a-14a (approving Board's reasoning in *Winn-Dixie Stores*). As the court noted, whereas "[c]ollective bargaining involves give and take on a number of issues," petitioner's approach would "permit the employer to remove, one by one, issues from the table and impair the ability to reach an overall agreement through compromise on particular items." *Id.* at 13a. Because the Board's impasse rule is rational and consistent with the Act, the court of appeals correctly afforded it deference. *Id.* at 14a; see *Fall River, supra.*

2. Petitioner errs in contending (Pet. 6) that the bargain-to-impasse rule applied by the Board and the court of appeals in this case is inconsistent with footnote 12 of this Court's decision in *NLRB* v. *Katz*, 369 U.S. 736, 745 n.12 (1962). In *Katz*, the Court ruled (*id.* at 743) that "an employer's unilateral change in conditions of employment under negotiation is * * * a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal [to negotiate]." The Court further made clear that such a unilateral change in employment conditions is unlawful even "without a general failure of subjective good faith" on the part of the employer because such a unilateral change amounts to a refusal to negotiate about the pertinent conditions, and "[a] refusal to negotiate *in fact* as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end." *Ibid.*

In *Katz*, the Court also ruled unlawful the employer's unilateral imposition of wage increases that were more generous than any proposal that had been made to the

union during negotiations, concluding that such unilateral action demonstrated that the employer had not negotiated with the union in good faith. The Court observed that "[a]n employer is not required to lead with his best offer," but it also made clear that "*even after an impasse is reached* he has no license to grant wage increases greater than any he has ever offered the union at the bargaining table, for such action is necessarily inconsistent with a sincere desire to conclude an agreement with the union." 369 U.S. at 745 (emphasis added).

In a footnote accompanying that last point, the Court added: "Of course, there is no resemblance between this situation and one wherein an employer, after notice and consultation, 'unilaterally' institutes a wage increase identical with one which the union has rejected as too low." 369 U.S. at 745 n.12. Petitioner would derive from that footnote a general rule that an employer need afford the union no more than "notice and consultation" prior to making unilateral changes to existing terms, irrespective of whether a bargaining impasse has been reached. See Pet. 9. The footnote, however, simply does not stand for any such proposition. Rather, the Court was distinguishing a situation in which the employer unilaterally imposes conditions that are *more* generous than any previously offered at the bargaining table (which "conclusively manifest[s] bad faith in the negotiations," 369 U.S. at 745) from one in which the employer imposes the *same* conditions that were previously offered but were rejected by the union (which does not per se show bad faith). The footnote was not addressed to the question whether an employer must negotiate to impasse, or instead need only offer the union notice and the opportunity for consultation

before unilaterally imposing conditions of employment that were previously offered but rejected by the union.

Moreover, as we have noted, the Court elsewhere in *Katz* unmistakably described the employer's duty not to make unilateral changes as continuing until "after an impasse is reached" in bargaining for an agreement. 369 U.S. at 745; see also *id.* at 741 n.7 (as long as the union is willing to negotiate "and no impasse has developed, the employer's obligation [to bargain] continues"). Furthermore, the Court since then has again made clear that "an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." *Litton Fin. Printing Div.* v. *NLRB*, 501 U.S. 190, 198 (1991) (citing *Katz*); see also *Laborers Health & Welfare Trust Fund* v. *Advanced Lightweight Concrete Co.*, 484 U.S. 539, 543-544 nn.5 & 6 (1988) (same).

3. Petitioner also argues (Pet. 6, 8-9, 10) that the court of appeals' decision conflicts with that of the Fifth Circuit in *NLRB* v. *Pinkston-Hollar Construction Services, Inc.*, 954 F.2d 306 (1992). Petitioner contends that the Fifth Circuit applies a rule that permits the employer to impose unilateral changes in conditions of employment after giving the union notice and an opportunity to respond, and does not require the employer to bargain to impasse before unilaterally changing conditions of employment. Pet. 9. That contention provides no basis for this Court's review. It is not clear that the Fifth Circuit currently applies the rule on which petitioner relies, and that circuit may clarify its position in light of the decision below and a decision of the Eleventh Circuit.

In *Pinkston-Hollar*, the Fifth Circuit held that an employer did not necessarily violate Section 8(a)(5) of

the Act when it unilaterally ceased making contributions to a union benefit plan and implemented its own benefit plan, after it had made such a proposal to the union and had invited the union to bargain over the proposal, and the union had avoided bargaining with the employer over the proposal. See 954 F.2d at 308-312. The central question in *Pinkston-Hollar* was "whether the Union's reluctance to bargain * * * excused the Company's unilateral implementation of changes." *Id.* at 310; see also *id.* at 310-311 n.3 (court is addressing "the situation in which the Union initially requests bargaining, and then stalls negotiations"). Recognizing a "narrow exception to the bargain to impasse rule" in that situation, the court held that "where, upon expiration of a collective bargaining agreement, the union has *avoided or delayed bargaining*, and the employer has given notice to the union of specific proposals the employer intends to implement, the employer may unilaterally implement the proposals without first bargaining to impasse." *Id.* at 311 (emphasis added). The court remanded the case to the Board for further consideration under that "narrow exception" to the impasse rule. *Id.* at 313.[4]

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[4] On remand, the Board found that the employer's unilateral changes did not violate the Act under the court's test. See *Pinkston-Hollar Constr. Servs., Inc.*, 312 N.L.R.B. 1004 (1993). Petitioner is incorrect, however, in asserting (Pet. 5-6) that, on remand, the Board "accepted" the court's test as general Board law. To the contrary, the Board made plain that it was "apply[ing] the court's 'notice and opportunity' standard only to this case," and that its decision on remand was "not to be construed as an adoption of the court's legal standard as Board precedent." 312 N.L.R.B. at 1004 n.4. Accordingly, there is no basis for petitioner's assertion (see Pet. i (Question 1), 6) that the Board applies different legal rules in different administrative regions.

Pinkston-Hollar need not be read as adopting a rule that an employer may impose unilateral changes in conditions of employment whenever it gives the union notice of and an opportunity to respond to the proposed changes, even if the parties have not reached impasse in their collective bargaining negotiations. Rather, it involves only the situation in which the employer gives the union notice of a proposed change and an opportunity to respond to the proposal, and the union fails to pursue bargaining on that proposal with due diligence, thereby arguably waiving any objection to "postexpiration unilateral implementation, even short of impasse." 954 F.2d at 312 n.6. Indeed, in *Pinkston-Hollar*, the Fifth Circuit also stated (citing *Katz*) that "an employer's unilateral change in conditions of employment *under negotiation* is a violation of section 8(a)(5) because it is tantamount to a flat refusal to bargain." *Id.* at 310 (emphasis added). It appears, therefore, that like the court of appeals in this case, the Fifth Circuit recognizes that as a general matter an employer may not unilaterally change conditions of employment unless the parties have reached impasse.

In *Pinkston-Hollar*, the court also cited a line of Fifth Circuit cases for the proposition that "unilateral implementation of changes in such a setting is not a violation of the duty to bargain collectively, even in the absence of an impasse, if the employer notifies the union that it intends to institute the change and gives the union the opportunity to respond to that notice." 954 F.2d at 311. The qualification "in such a setting" is important, for the court's summarization of its prior cases at that point followed immediately after its observation that an employer may unilaterally implement changes when "the union has avoided or delayed bargaining." *Ibid.* Thus, even if the Fifth Circuit at one

point might have recognized a broader authority on the part of employers to implement unilateral changes, the court's most recent synthesis of its case law suggests that such authority is limited to the situation where the union avoids bargaining over the matter in question.[5]

As the court below concluded, therefore, the Fifth Circuit's decision in *Pinkston-Hollar* by its own terms is "best understood" as articulating a limited exception to the impasse rule applicable to situations where the union has "failed to bargain and to act with due diligence after being given the employer's proposal." Pet. App. 14a. The Eleventh Circuit has adopted a similar understanding of the Fifth Circuit's decision in *Pinkston-Hollar*. See *NLRB* v. *Triple A Fire Protection, Inc.*, 136 F.3d 727, 738-739 (11th Cir. 1998) (noting that employer argued in that case that, under *Pinkston-Hollar*, if "the union unreasonably delays or stalls the bargaining process, the employer may make unilateral changes without bargaining to impasse if it

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[5] In *Nabors Trailers, Inc.* v. *NLRB*, 910 F.2d 268 (1990), cert. granted, 500 U.S. 903, cert. dismissed, 501 U.S. 1266 (1991), which was decided before *Pinkston-Hollar*, the Fifth Circuit articulated a broader exception to the impasse rule not limited to situations involving dilatory tactics on the part of the union. See 910 F.2d at 273 ("even in the absence of an impasse," the employer satisfies its bargaining obligation if it "notifies the union that it intends to institute the change and gives the union the opportunity to respond to that notice"). This Court granted the Board's petition for a writ of certiorari in *Nabors Trailers*, see *NLRB* v. *Nabors Trailers, Inc.*, 500 U.S. 903 (1991), but the matter was subsequently settled and the writ of certiorari was dismissed based on the parties' settlement, see 501 U.S. 1266 (1991). For the reasons discussed in the text, however, the Fifth Circuit's decision in *Pinkston-Hollar* raises a question as to whether that court continues to subscribe to the broad exception to the impasse rule articulated in *Nabors Trailers*.

first notifies the union of its intent to make the[] changes," but concluding that, "[a]ssuming *arguendo* that the *Pinkston-Hollar* rule is applicable in this circuit," employer's unilateral changes were unlawful, given lack of evidence of bargaining delay on union's part), cert. denied, 119 S. Ct. 795 (1999). The First and Eleventh Circuits' explication of *Pinkston-Hollar* may lead the Fifth Circuit to clarify its position in a future decision, but at present it appears that the Fifth Circuit recognizes an exception to the impasse rule only where the union has avoided or delayed bargaining. That exception is not applicable here, for the court of appeals noted that "[petitioner] does not argue here that the Union avoided or delayed bargaining," and it therefore properly concluded that "*Pinkston-Hollar* is, even on its own terms, inapplicable". Pet. App. 14a.

4. Finally, petitioner contends (Pet. 9-10; see also Pet. i (Question 2)) that, insofar as the Board did not order it to rescind the two unilaterally implemented two percent wage increases, the Board's order in this case is "punitive," rather than "remedial." Petitioner failed, however, to raise that objection before the Board. Petitioner could and should have raised its claim in a motion for reconsideration, once the Board issued the remedial order to which it now objects. See 29 U.S.C. 160(e) ("[n]o objection that has not been urged before the Board * * * shall be considered" on judicial review, "unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances"); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). Having failed to present its objection to the Board, petitioner is jurisdictionally barred from raising it here. See 29 C.F.R. 102.48(d)(1); *International Ladies' Garment*

Workers' Union v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

In any event, there is no merit to petitioner's claim. The Union did not file charges challenging petitioner's unilateral wage increases, nor did the General Counsel allege in the complaint that those changes were unlawful. Pet. App. 21a, 25a. The court of appeals properly concluded that "[t]here is nothing punitive about the Board's decision not to act on the wage increases in the absence of an unfair labor practice charge," for "[i]n the quid pro quo of collective bargaining, that employees may keep the quid of wage increases while the employer may not keep the quo of the rest of the package is the consequence of the employer's decision to unilaterally remove these subjects from bargaining." *Id.* at 21a. Contrary to petitioner's assertion (Pet. 10), the Board's remedy does not "compel" it to make "concessions" to the Union. Rather, the Board's order leaves it open to petitioner to rescind the wage increases after bargaining in good faith with the Union. See Pet. App. 54a. Because the Board's remedial views "merit the greatest deference," petitioner's challenge to the Board's remedy in this case is without merit. *ABF Freight Sys., Inc.* v. *NLRB*, 510 U.S. 317, 324 (1994).[6]

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[6] Petitioner is mistaken in suggesting that only by ordering rescission of the wage increases could the Board achieve a return to the "full status quo." Pet. 10 (emphasis omitted). The Board could reasonably conclude that rescission of the wage increases would not have restored the *status quo ante*. Absent petitioner's unilateral changes, the employees would not have seen their paychecks increase. That state of affairs, however, cannot be recreated without requiring the employees to now give up an enjoyed benefit. Were that to occur, the Union would arguably be left in a worse position vis-à-vis the employees, compared to the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1999

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status quo ante, since the employees would likely blame the Union for their loss in pay, particularly where the pay increase was not alleged by the General Counsel or found by the Board to have been unlawful in the first place.